METRO KURNIA SDN BHD & ANOR A

v.

NG CHIN LEAN & ANOTHER CASE

HIGH COURT MALAYA, ALOR SETAR B
SEE MEE CHUN JC
[CIVIL SUITS NO: 22-206-2007 & 22-197-2009]
9 JANUARY 2012

TORT: *Defamation - Libel - Defamatory remarks published in newspaper - Whether words referred to plaintiffs - Whether context in which words used must be taken into account - Whether claim to be allowed* C

The first plaintiff ('P1') in both the suits was a company that ran a private hospital in Sungai Petani, Kedah, in which the second plaintiff ('P2') was its director of clinical services and one of two consultant D
paediatricians. The plaintiffs sued the defendant Ng Chin Lean ('Ng') for uttering words defamatory ('the words') of them during a press conference called by her in relation to medical treatment which her daughter had received at the hospital. The words were published in several Chinese newspapers including Nanyang Siang Pau ('Nanyang'), E
The China Press, Oriental Daily News, Guang Ming Daily and Kwong Wah Yit Poh. Although P1 and P2 were not named in Nanyang, the plaintiffs suggested that those who read The China Press and Kwong Wah Yit Poh would understand that the story in Nanyang referred to them. The China Press had referred to "a Dr Lim" while Kwong Wah F
Yit Poh not only specifically referred to P2 by name but had also published his photograph. Besides suing Ng alone, the plaintiffs also sued the owner and publisher of Nanyang and its editor-in-chief at the material time.

Held (dismissing claim in both suits with costs): G

(1) It had not been proved that the words in Nanyang referred to P1 and P2. The words used in Nanyang were "doctor" and "doctor in charge" with no mention of the location of the specialist hospital except that it was in Kedah. It could not be said that the words in H
Nanyang were capable of referring to either P1 or P2. Although Kedah was a small state it was not that small that it could reasonably be inferred that the reference was to Metro in Sungai Petani considering there was more than one private hospital in the state and two private hospitals in Sungai Petani. (paras 7 & 15)

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(2) As the plaintiffs sought to rely on extraneous facts that those who read The China Press or Kwong Wah Yit Poh would know the words in Nanyang referred to them, this ought to have been pleaded. What was pleaded was not sufficient as it did not link The

China Press or Kwong Wah Yit Poh to the words in Nanyang. Even if the general inference was sufficient, there was no evidence in the form of those who had read The China Press or Kwong Wah Yit Poh to say that after reading those newspapers and then the words in Nanyang, they understood the words to refer to the plaintiffs. (paras 12 & 13)

(3) There was no defamation in respect of the words published in any of the Chinese newspapers except Kwong Wah Yit Poh as it had not been proved that the words in the other newspapers referred to the plaintiffs. In Kwong Wah Yit Poh there was specific reference to P2 by name with his photograph as well. Here the words referred to P2 and by extension, the place where he worked, Metro, which was run by P1. (paras 18 & 19)

(4) In determining whether the words complained of were defamatory, one had to take into account not only the actual words but the context in which they were used because there may be other words which took away the sting. Kwong Wah Yit Poh published a detailed explanation by P2 in reply to the allegations made by Ng which were published earlier. The clarification given and published took away the sting of the words in ordinary reasonable people of fair average intelligence who were not avid for scandal and not unduly suspicious such that there was no defamation. (paras 21, 27 & 28)

[Commentary: This case showed how a defendant-mother escaped probable liability for defamation for making scathing remarks about the medical treatment her child had received at the hands of the plaintiffs. Publication of the defamation was prima facie proved in the case of one Chinese newspaper which identified the plaintiffs. However, because that newspaper subsequently published a detailed explanation by the plaintiff-doctor in reply to the allegations made by the mother, the court held that that subsequent act by the newspaper had removed the 'sting' from the earlier defamatory remarks made by the woman such as to negative the defamation].

Case(s) referred to:

Badrul Zaman PS Md Zakariah v. Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors and Other Cases [2009] 7 CLJ 285 HC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***

Noor Asiah Mahmood & Anor v. Randhir Singh & Ors [2000] 5 CLJ 407 HC ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] All ER 495 ***(refd)***

Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors [1999] 8 CLJ 499 HC ***(refd)***

Soh Chun Seng v. CTOS-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(1)

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn, p 625

(Case No: 22-206-2007)
For the plaintiff - Wong Yee Chue (Tay Hong Jin with him); M/s YC Wong
For the defendant - T Jegadeeson; M/s Jega Kumar & Partners

(Case No: 22-197-2009)
For the plaintiff - Wong Yee Chue (Tay Hong Jin with him); M/s YC Wong
For the defendants - Yiew Voon Lee; M/s CH Yeoh & Yiew

Reported by Ashok Kumar

JUDGMENT

See Mee Chun JC:

[1] In suit no. GS 22-206-2007 (2007 suit) plaintiffs are suing Ng Chin Lean (Ng) for defamation as a result of statements made concerning them which were published in the Nanyang Siang Pau (Nanyang) issue of 24 September 2006 and in other Chinese newspapers. The first plaintiff (P1) is a private limited company running a private hospital known as Metro Specialist Hospital (Metro) in Sungai Petani, Kedah. The second plaintiff (P2) is the director of Clinical Services and one of two consultant paediatricians in Metro. In suit no. GS 22-197-2009 (2009 suit) the same plaintiffs are suing first defendant (D1) who is the proprietor and publisher of Nanyang and second defendant (D2) who was the editor in chief of Nanyang at the relevant time for publishing articles defamatory of them in the Nanyang issue of 24 September 2006 (Nanyang issue). On 14 June 2010 by consent all parties agreed that the 2007 and 2009 suits be jointly heard. Reference to defendants will be as per the respective suits.

[2] On 27 July 2006 Ng's then three year old daughter Ch'ng Ee Hung (the patient) was admitted into Metro and was there until 15 August 2006 when she was transferred to Alor Setar Hospital. Ng is said to have held a press conference on 23 September 2006 where she uttered words defamatory of P1 and P2 (the said words). The said words were published in the Nanyang and other Chinese newspapers on 24 September 2006. The said words in Chinese and its translation in Bahasa Malaysia are set out in para. 5.1 (Nanyang), 5.2 (China Press), 5.3 (Oriental Daily News), 5.4 (Guang Ming Daily), and 5.5 (Kwong Wah Yit Poh) of its amended statement of claim dated 3 May 2011. The statement of claim with the said words

was also translated into English. The said words in the Nanyang issue are to be found in Bundle B 36-37 (Chinese version) and the English translation in Bundle B 38-44. That appearing in the other Chinese papers with the English translation are to be found in Bundle B 45-47. In so far as the translation goes there was a point of contention as to whether the Chinese word 'yong yi' ought to be translated into "quack doctor" or "stupid doctor".

[3] Essentially the said words relate to exorbitant fees being charged, scalds on the patient, coughing out a cotton gauze from the patient and P2 being a quack doctor.

[4] It is well settled law that in order to prove a claim on defamation, three elements must be established - (1) the statement must be defamatory, (2) the statement must refer to the plaintiff and (3) the statement must be published by defendants to a third party.

As Against D1 And D2 In The 2009 Suit

Whether the said words refer to P1 and P2

[5] It is not disputed P1 and P2 are not named in the Nanyang issue. P2 who gave evidence for himself as well as representing P1 agreed that both the names of P1 and P2 do not appear in the Chinese version or English and Bahasa Malaysia translations and that throughout the Nanyang issue reference was made to "doctor" and "doctor in charge". P2 further agreed the Nanyang issue referred to the location of the specialist hospital as being in Kedah and there was more than one private hospital in Kedah. It was also P2's evidence there are only specialists in Metro with no general practitioners other than in accident and emergency and more than one consultant paediatrician in Metro. The patient was treated by no less than a team of six persons while in Metro and he was overall responsible for the medical treatment of the patient.

[6] The law is clear that the onus lies on the plaintiffs to prove the said words in the Nanyang issue refer to them. Refer to *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268 where it is stated "the burden remains on the plaintiff to show that the words complained of, refer to him. It is for the plaintiff to establish objectively that he was the person to be identified by the words used". Refer also to *Knupffer v. London Express Newspaper Ltd* [1944] All ER 495 where it was stated at p. 497:

> There are two questions involved in the attempts to identify the appellant as the person defamed. The first is a question of law-can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead to him?

[7] From the evidence adduced where the words used are "doctor" and "doctor in charge" and with no mention of the location of the specialist hospital except that it was in Kedah it cannot be said that the said words in the Nanyang issue are capable of referring to either P1 and/or P2. Granted Kedah is a small state but it is not that small that it can reasonably be inferred the reference was to Metro in Sungai Petani considering there is more than one private hospital in the state and for that matter two private hospitals in Sungai Petani.

[8] P1 sought to rely on a photograph of Ng holding a bill purportedly showing the logo of "Metro Specialist Hospital" together with the word "Metro". Having looked at it myself I am unable to see the logo or the word "Metro". Even though D2 had said that the newspaper would fade after a lapse of time and P2's evidence that the logo could be seen in September 2006, the fact of the matter is not so much the fading but the word and logo is not visible to the naked eye.

[9] The China Press (Bundle B 45-48) had referred to "a Dr Lim" and Kwong Wah Yit Poh (Bundle B 64-77) had specifically referred to P2 by name and also had his photograph. This gives rise to the suggestion, those who read China Press or Kwong Wah Yit Poh would understand the said words in the Nanyang issue as referring to P1 and P2. Defendants stated these special facts must be pleaded. Plaintiffs submitted its para. 6 (iii) and (iv) of its amended statement of claim have pleaded the general inference.

[10] In *Bullen & Leake & Jacob's Precedents of Pleadings* 13th edn, it is stated at p. 625:

> Libel and slander – pleading reference to the plaintiff – innuendoes. The statement of claim must plead that the words complained of were published "of the plaintiff". Where special facts are relied on to establish that the words did refer to the plaintiff, those facts must be pleaded in the statement of claim with particulars of the persons or classes of persons who both read the words complained of and knew the facts relied on. Where the facts are generally known, and the publication is wide, it is often sufficient to plead a general inference that a substantial number of unidentifiable persons would have known the facts and understood the words complained of to refer to the plaintiff.

[11] Paragraphs 6 (iii) and (iv) of the plaintiffs' amended statement of claim state as follows:

> (iii) The plaintiffs received phone calls from the public on the day the aforesaid articles were published and a few days thereafter inquiring about the matters published including the said words.

(iv) The 2nd plaintiff was specifically asked by some of his patients' parents about the matters published in the aforesaid articles including the said words.

[12] As plaintiffs are seeking to rely on extraneous facts that those who read China Press or Kwong Wah Yit Poh would know the said words in the Nanyang issue was referring to them, this ought to have been pleaded. Paragraph 6(iii) and (iv) is not sufficient as it does not link China Press or Kwong Wah Yit Poh to the said words in the Nanyang issue. It is all about the said words in the Nanyang issue. The evidence of P2 that he had been asked by some patients' parents about the matters published is also not sufficient as the aforesaid link has not been shown.

[13] Even if the general inference in para. 6(iii) and (iv) is sufficient there was no evidence in the form of those who had read China Press or Kwong Wah Yit Poh to say after reading these newspapers and then the said words in Nanyang issue they understood the said words to refer to P1 and P2. The evidence of P2 as referred to above is clearly not such evidence. The case of *Badrul Zaman Ps Md Zakariah v. Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors and Other Cases* [2009] 7 CLJ 285 is most instructive. At p. 296 it was stated:

> The extrinsic facts relied upon were such that the plaintiff was shown on the television network such as TV3 a day before publication in all the newspapers; …
>
> Accepting that the video clip aired in the TV3 news report would cause a person watching the TV3 news report to associate the report with the plaintiff, it is plain that the person reading the news report in Utusan, and familiar with the TV3 news report would identify the Utusan news report with the plaintiff. The material for the reports by both Utusan and TV3 came from the same press conference … Without foreknowledge on the part of the video clip the Utusan news report of the press conference must be considered on its own.

[14] In this instant case there was no evidence that a person having read China Press or Kwong Wah Yit Poh and then reading the said words in the Nanyang issue would then associate the said words with P1 and P2. On the plaintiffs' assertion that this had not been pleaded by the defendants, this being the plaintiffs' case, the plaintiffs ought to prove that the said words in the Nanyang issue refers to them.

[15] It has not been proved that the said words in the Nanyang issue refer to P1 and P2.

As Against Ng In The 2007 Suit

[16] The defamation complained of is in relation to the said words in the Nanyang issue, China Press, Oriental Daily News, Guang Ming Daily and Kwong Wah Yit Poh. Refer to paras. 5.1, 5.2, 5.3, 5.4 and 5.5 of amended statement of claim.

[17] Defendant submitted P2 was only giving evidence for himself and not P1. It is however P2's evidence he is the representative of P1 and as such he can give evidence for P1 too. On the omission of potential defendants O. 15 r. 6(1) of the Rules of the High Court 1980 states no cause or matter shall be defeated by reason of the nonjoinder of any party.

Whether the said words refer to P1 and P2

[18] In relation to the Nanyang issue my finding and reasoning above that the said words do not refer to P1 and P2 also applies here. The same also goes for China Press where the reference is to "a Dr Lim" (Bundle B 47), in Oriental Daily News to "paediatrician in charge" and "doctor in charge" (Bundle B 51-54) and to Guang Ming Daily "paediatrician in charge" (Bundle B 58). There is no defamation in respect of the said words in these newspapers as it has not been proved they refer to P1 and P2.

[19] However the position in Kwong Wah Yit Poh is very different where there is a specific reference to P2 by name with his photograph as well (Bundle B 67-68). Here the said words refer to P2 and by extension the place where he works, Metro, which is run by P1.

Whether the said words are defamatory

[20] I will now confine myself to the said words in the Kwong Wah Yit Poh issue which are pleaded in para. 5.5. In determining whether words are defamatory the Court of Appeal case of *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 the court said at p. 467:

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[21] However in determining whether the words complained of are defamatory one must take into account not only the actual words but the context in which they were used. This is because there may be other words which take away the sting. Refer to *Soh Chun Seng v. CTOS-EMR Sdn Bhd* [2004] 5 CLJ 46 where the following was stated:

> In Gatley … states:
>
> It is necessary to take into consideration, not only the actual words used, but the context of the words.

A At p 97, … continues:

> It follows from the fact that the context and circumstances of the publication must be taken into account and that the Plaintiff cannot pick and choose parts of the publication which standing alone, would be defamatory, but there may be other passages which take away the sting.

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[22] *Soh* (*supra*) also referred to two other cases *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499 where it was stated at p. 504 that "it is necessary to consider the whole article" and *Noor Asiah Mahmood & Anor v. Randhir Singh & Ors* [2000] 5 CLJ 407 C " … that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reader to the entire publication".

D **[23]** Further, the standard to be adopted when determining whether there has been defamation is that "of ordinary reasonable people", "of fair average intelligence", "but who are not avid for scandal" and should not be unduly suspicious" (*Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301, at p. 312). At the same page it goes on as follows:

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> As such an ordinary reasonable person would presume that a man is innocent until proven guilty although the reality might sometimes be otherwise. This is necessary to protect the media who go no further than merely to report that a person is being investigated by police or has been arrested and charged with a criminal offence.

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[24] With the principles as laid out in the aforesaid cases in mind I proceed to consider the alleged defamatory said words as against Ng.

[25] The heading in the Kwong Wah Yit Poh issue is "Case of Female G Toddler Vomitting Gauze" and "Admitted to Hospital for Pneumonia Instead had Emergencies One After Another Female Toddler Nearly Killed". The article goes on and reads as per pleading " … and even coughed out a piece of gauze left in the body due to negligence" (para. 5.5.1.1), " …. for emergency treatment for the pneumonia she had contracted but unexpectedly due to the hospital's negligence again and H again emergencies kept arising …" (para. 5.5.1.2), "She said in indignant(sic) that after spending more than forty thousand ringgit in the private hospital her daughter still had to undergo so much of sufferings. Luckily she got the professional doctors in the government hospital who managed to save her (para. 5.5.1.8), " … informed the hospital authority I of their wish of transferring her but the said doctor objected for the transfer …" (para. 5.5.2.4) and "the patient's mother … suspected that the so called bacterial infection was caused by the negligence of the doctor leaving behind the gauze during the operation" (para. 5.5.2.6).

[26] Ng has admitted to making those statements complained of and defendant's submission on control of contents of publication, plaintiffs failing to show concrete evidence that the said words were uttered in verbatim by Ng and the language used by Ng and the statements were a product of the reporters journalistic skills cannot stand. Anyhow the defamatory words in Chinese are pleaded and both the Bahasa Malaysia and English translations are also set out. There are no disputes as to the translations except for the choice of the words "quack doctor" which does not appear in the Kwong Wah Yit Poh issue.

[27] The clarification of P2 was published and the English translation is to be found in Bundle B 74-76. The heading reads " … To protect the interior part of the mouth of the female toddler" and "Gauze was not left behind by surgery". What follows is the detailed explanation by P2 and the relevant parts are as follows:

(1) at page 75 "As to the matter whereby the female toddler coughed out a piece of gauze he explained the reason was that it was placed in her mouth when fixing the breathing aid inside her mouth. It was to protect the internal part of the female toddler's mouth and was not negligently left inside … and subsequently being coughed out.

(2) at page 75-76 "As to … wanting to get her transferred and that he had objected was because at that time the condition … was very bad and highly unsuitable for her to be transported to another hospital …"

(3) at page 77 " … medications … when she was in the intensive care unit were all superior quality, that was why the medical expenses were expensive …".

[28] The clarification given and published has taken away the sting of the said words in ordinary reasonable people of fair average intelligence who are not avid for scandal and not unduly suspicious such that there is no defamation.

Conclusion

[29] For the above reasons the plaintiffs' claims in the 2007 and 2009 suits are dismissed with costs.